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No. 05-776

IN THE
Supreme Court of the United States

RICHARD DISHER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

CITIGROUP GLOBAL MARKETS INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

This case presents the same question that was recently resolved by this Court in *Kircher v. Putnam Funds Trust*, No. 05-409 (June 15, 2006): whether 28 U.S.C. § 1447(d) precludes a court of appeals from exercising appellate jurisdiction to review a district court order remanding state-law claims for lack of subject-matter jurisdiction under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). In *Kircher*, this Court held that § 1447(d) precludes appellate review of such remand orders. The same holding applies here.

Respondent argues that the Court should deny the petition for a writ of certiorari because, in its view, this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006), foreordains the outcome in this case. Respondent further contends that, if the Court grants the petition and vacates the court of appeals' decision, the district court will decide in the first instance whether *Dabit* requires that petitioner's claims be dismissed. Neither contention has merit. This Court should follow its normal course and grant the petition, vacate the Seventh Circuit's order, and remand for further proceedings.

1. Under *Kircher*, the Seventh Circuit's decision in this case cannot stand. As in *Kircher*, the district court in this case remanded to state court based on its conclusion that it lacked subject-matter jurisdiction because the criteria for preemption under SLUSA had not been met. *See* Pet. App. 13a-14a; *see also id.* at 12a (describing order as "remand[ing] . . . to state court for lack of subject matter jurisdiction").[1] Section 1447(d) therefore barred the court of

[1] Respondent reiterates its contention that the district court did not understand its remand order to be based on a lack of subject-matter jurisdiction. *See* Supp. Brief 3 n.1. But this Court held in *Kircher* that SLUSA authorizes the removal only of those claims that satisfy SLUSA's preemption criteria "as set forth in subsection (b)" of 15 U.S.C. § 77p. *See Kircher*, slip op. at 8 ("we read authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, as confined to cases 'set forth in subsection (b)'") (quoting 15

appeals from exercising jurisdiction to review the district court's remand order. Indeed, respondent concedes that *Kircher* establishes that the Seventh Circuit "may have lacked appellate jurisdiction in this case." Supp. Br. 2-3.

2. Nevertheless, respondent contends that the Court should deny the petition in light of *Dabit*, which holds that holder claims meet the "in connection with" criterion of § 77p(b). *See* 126 S. Ct. at 1515. According to respondent, *Dabit* requires that the petition be denied because a redetermination in light of *Kircher* will not affect the ultimate outcome of the case. *See* Supp. Br. 3 (quoting *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)).[2]

Dabit does not establish, however, that petitioner's claims are precluded by SLUSA. In *Dabit*, this Court considered only whether holder claims meet the "in connection with" criterion of § 77p(b); the Court did not address the meaning or application of SLUSA's "fraud" requirement or any of the other requirements for preclusion under SLUSA. *See* 15 U.S.C. § 77p(b). In *Dabit*, the plaintiffs had admittedly alleged fraudulent statements, and "[t]he only disputed issue [was] whether the alleged wrongdoing was 'in connection with the purchase or sale' of securities." 126 S. Ct. at 1512. Here, by contrast, petitioner's claims are not based on misrepresentations; petitioner alleges that respondent breached its customer contracts and its fiduciary duty to its customers and acted negligently by failing to supervise its researchers and by

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U.S.C. § 77p(c)). Therefore, by remanding on the ground that SLUSA's preemption criteria had not been met, the district court necessarily based its remand on the conclusion that it lacked subject-matter jurisdiction. Indeed, in vacating its earlier order remanding the case to state court, the district court confirmed that it had "remanded this action to state court for lack of subject matter jurisdiction." Pet. App. 12a. The district court's remand order therefore is not properly subject to appellate review.

[2] The respondents in *Kircher* made a similar argument in a post-argument supplemental brief, which this Court necessarily rejected in vacating the Seventh Circuit's judgment.

issuing inaccurate reports, and that respondent was unjustly enriched by not adequately performing services purchased by petitioner. *See* Pet. 7.

Because *Dabit* addressed only whether holder claims are affected by the "in connection with the purchase or sale" language of SLUSA, the parties should be permitted to litigate on remand in state court whether and, if so, how *Dabit* applies to the claims presented in this case, and whether the other criteria for SLUSA preclusion have been met in this case. Although, as respondent notes (Supp. Br. 5), petitioner focused in the lower courts on the argument that the "in connection with" requirement had not been satisfied, petitioner has never conceded that *any* of the other criteria for preclusion have been met. And, because the district court remanded petitioner's claims for lack of subject-matter jurisdiction, *Kircher* dictates that the state court be permitted in the first instance to decide how, if at all, *Dabit* affects the outcome of this case. Just as *Kircher* permits the parties to litigate in state court about the application of SLUSA, so too here a grant, vacate, and remand would have the same effect.

3. Respondent's other, collateral argument – that, if this Court vacates the Seventh Circuit's order, the district court, and not the state court, will decide in the first instance whether *Dabit* precludes petitioner's claims – also has no merit. Respondent bases that argument on the fact that, after the Seventh Circuit reversed the district court's order remanding the case to state court and remanded with instructions to dismiss the action, the district court vacated its remand order and dismissed petitioner's claims. In respondent's view, because the district court entered a dismissal order, it is required in the first instance to make the substantive determination whether *Dabit* precludes petitioner's claims.

Respondent's position is incorrect. The district court's order of dismissal was a direct consequence of the Seventh Circuit's improper exercise of appellate jurisdiction. As in *Kircher*, the proper course on remand from this Court

would be for the district court to vacate its dismissal and to reinstate its original remand order. The state trial court can then evaluate petitioner's claims under SLUSA and assess not only the effect of *Dabit* on petitioner's claim, but also whether the other criteria for preclusion under SLUSA have been met. *See Kircher*, slip op. 14 n.15.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Kircher*.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent acknowledges that this Court has already agreed to resolve both questions presented in this petition. The first question, whether the court of appeals has jurisdiction to review an order of the district court remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), is presented in *Kircher v. Putnam Funds Trust*, 05-409, in which the Court granted certiorari on January 6, 2006. The second question presented, which concerns the court of appeals' holding that SLUSA preempts claims brought by holders of securities, is before the Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371 (argued and submitted Jan. 18, 2006), on review of the Second Circuit's conclusion that SLUSA does *not* preempt such holder claims. The petition in this case should be held pending the decisions in *Kircher* and *Dabit* and then disposed of as appropriate in light of those decisions.

Respondent essentially agrees that this petition should be held pending the resolution of *Dabit* and *Kircher*. Respondent instead focuses on arguing that this Court should hold in *Dabit* that SLUSA preempts claims brought by holders of securities. It also suggests that the district court in this case did not in fact remand for lack of subject-matter jurisdiction, but instead based its remand order on the substantive determination that SLUSA did not preempt petitioner's claim. Neither position has merit. The district court correctly held that SLUSA does not preempt holder claims, and it clearly based its remand order on the determination that it lacked subject-matter jurisdiction. Finally, respondent contends that the petition should not be held pending the decision in *Kircher* if the Court decides in *Dabit* that SLUSA preempts holder claims. There are good reasons, however, to hold the petition pending the resolution of *Kircher*.

I. SLUSA Does Not Preempt Holder Claims

Respondent does not dispute that this petition should be held pending the resolution of *Dabit*. Instead, respondent argues that this Court should rule in *Dabit* that SLUSA preempts class actions brought by holders, as opposed to purchasers or sellers, of securities. Opp. 11. As the respondent in *Dabit* correctly argues, however, SLUSA does not preempt claims brought by private plaintiffs who neither bought nor sold any security in connection with a defendant's misconduct. SLUSA preempts only those class actions that allege that a defendant made "an untrue statement or omission of a material fact" or used "any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b). The operative language in SLUSA's preemption provision – "in connection with the purchase or sale" – replicates the identical phrase in § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 (17 C.F.R. § 240.10b-5), both of which proscribe fraudulent conduct "in connection with the purchase or sale of any security."

In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), this Court held, based on an interpretation of that phrase, that a private party does not allege misconduct "in connection with the purchase or sale of any security" within the meaning of § 10(b) and Rule 10b-5 unless that misconduct was in connection with the plaintiff's own purchase or sale of a security. *See id.* at 730-31, 749. "When . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see Lorillard v. Pons*, 434 U.S. 575, 581 (1978). The phrase "in connection with the purchase or sale" in SLUSA's preemption provision therefore must have the same meaning as the identical language in § 10(b) and Rule 10b-5. Accordingly, SLUSA's preemption provision

does not apply to claims brought by holders of securities, as opposed to purchasers or sellers. *See generally* Resp. Br. at 21-38, No. 04-1371.

II. The District Court Correctly Remanded The Case Based On Its Determination That It Lacked Subject-Matter Jurisdiction

Respondent suggests in its statement of the case that the district court did not base its remand on a finding that it lacked subject-matter jurisdiction under SLUSA. Instead, respondent asserts, the district court found that removal was proper and then remanded after making the substantive determination that the case "does not involve misrepresentation or omissions of material fact 'in connection with the purchase or sale of a covered security.'" Opp. 8 (quoting Pet. App. 14a). This claim lacks merit.

SLUSA authorizes the removal only of those claims that satisfy SLUSA's preemption criteria "as set forth in subsection (b)" of § 77p. 15 U.S.C. § 77p(c). Petitioner's claims do not satisfy those preemption criteria because, as explained above, SLUSA does not preempt holder claims. The district court therefore lacked subject-matter jurisdiction under SLUSA to hear those claims. Indeed, the district court itself did not agree with respondent's characterization of its remand order. In its order vacating its earlier order remanding the case to state court, the district court explained that it had "remanded this action to state court for lack of subject matter jurisdiction." Pet. App. 12a. Because the district court remanded the case for lack of subject-matter jurisdiction, 28 U.S.C. § 1447(d) prohibited the court of appeals from reviewing that remand order. *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52 (1976). *See generally* Pet'rs Br. at 19-45, No. 05-409.

III. The Petition Should Be Held Pending This Court's Decision In *Kircher*

Although respondent agrees that this petition should be held pending the resolution of *Dabit*, respondent contends that this Court should not hold the petition pending the decision in *Kircher* if the Court first holds in *Dabit* that SLUSA preempts claims brought by private plaintiffs who neither bought nor sold any security in connection with a defendant's misconduct. That position is unpersuasive. If this Court decides *Kircher* before *Dabit*, and rules in *Kircher* that courts of appeals lack jurisdiction to review district court orders remanding for lack of subject-matter jurisdiction cases removed under SLUSA, the petitioner here should get the benefit of that decision. Such a decision would require the vacatur of the court of appeals' decision in this case and would likely result in this case's being remanded to state court, as originally ordered by the district court.

Even if the Court decides *Dabit* before *Kircher*, it should still hold this case for decision in *Kircher*. Because petitioner's position here is that this case was improperly removed, the state court in the first instance should be permitted to decide how, if at all, this Court's decision in *Dabit* will affect the outcome of this case. That is true regardless of whether this Court affirms, reverses, or vacates the Second Circuit's decision in *Dabit*. Because the question presented in *Dabit* addresses only whether holder claims are affected by the "in connection with the purchase or sale" language of SLUSA, the parties should be permitted to argue how *Dabit* should be applied to the facts alleged and claims presented in this case – but to do so in whatever forum this Court ultimately deems is appropriate in light of its disposition in *Kircher*. The "in connection with the purchase or sale" language only addresses one aspect of SLUSA preemption, and a remand would permit the parties to address whether SLUSA properly applies to this case. The Court's decision in *Kircher* will dictate whether the court of appeals had ju-

risdiction to review the district court's remand order and, consequently, whether this case should appropriately be remanded to state court. Accordingly, the Court should hold the petition pending resolution of the jurisdictional issue in *Kircher*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending the resolution of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371, and *Kircher v. Putnam Funds Trust*, No. 05-409, and then disposed of as appropriate in light of those decisions.

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